No. 2935

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE as Trustee for said S. M. Kanakanui,

Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

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STATEMENT OF THE CASE.

This is a writ of error to review a judgment of the United States District Court for the Territory of Hawaii, sitting as a court of claims under the Act of March 3, 1887 (24 Stat. 505), the Tucker Act so called, in which the plaintiffs alleged that their land had been condemned in an action brought in the same court by the United States of America by a final judgment September 7, 1911; that the United States suffered the judgment to remain unpaid and claimed under the same for two years, and that by reason of the premises the plaintiffs were entitled to recover damages, amounting in all to $6,164.85,

"upon a claim founded upon the Constitution of the United States, upon the laws of Congress, upon a contract express or implied, and for their damages in a case not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; and they further allege that they are entitled to recover also against the United States by reason of the provisions of Section 505 of the Revised Laws of Hawaii, 1905, now Section 676 of the Revised Laws of Hawaii, 1915, and pursuant to said Constitution and laws."

A demurrer was interposed which was sustained by the court below in a careful opinion, on the ground that Section 676 is substantive law and not procedure and therefore not adopted by the statute adopting local procedure, that within the Tucker Act there was no taking of property for which compensation is due and for which there is any contract express or implied to reimburse, and that the claim for damages sounding in tort is expressly disallowed by that Act.

CLAIM OF THE PLAINTIFFS.

Plaintiffs claim under Section 676 as follows:

"Sec. 676. *Payment of judgment, penalties.* The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure so to do all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed more than thirty days after final judgment, then interest shall be added at the rate of seven per cent. per annum. Such payment shall be made to the

clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court, reasonable expenses and such damage as may have been sustained by him by reason of the bringing of the action."

on the ground that the United States having brought this action and secured the condemnation of the plaintiffs' land, in accordance with the laws of the Territory of Hawaii as provided by the Act of Congress, and procured the entry of a judgment, under which judgment by virtue of the section it acquired the right to take the land and to delay payment for two years, and having during those two years claimed the right to the property under what the court below calls an option, and having tied it up for the two years under this cloud and prevented its disposition, the United States is liable for the consequences of its voluntary act in taking advantage of the Hawaiian statute. The complaint shows the item of damages. As a matter of fact, we think it would be admitted by the Government that the plaintiffs' damages, including those for which it apparently has no redress, would be more nearly $20,000 under the very peculiar circumstances of this case; but the amount of damages is immaterial in this form.

The claim rests in law on three different grounds, which are not exclusive of each other, all of which grounds Congress has made the basis of action under the Tucker Act, and waived the immunity of the United States to suit, viz:

"All claims founded upon the Constitution of the United States or any law of Congress, * * * or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

These grounds are:

(a) The claim is founded upon the 5th Amendment to the Constitution of the United States, which provides:

"No person shall * * * be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

(b) The proceeding was prosecuted under the Act of Congress of August 18, 1890, for the condemnation of sites for fortifications and coast defense as follows:

"Hereafter the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement, by condemnation, of any land, or right pertaining thereto, needed for the site, location, construction or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted."

Our claim is that having brought it under an Act of Congress providing that it should be prosecuted in

accordance with the laws of the Territory of Hawaii, Section 676 of the Revised Laws of Hawaii, 1915, applies; and,

(c) The claim is founded upon an express contract on the part of the United States made by law to pay the sums provided to be paid by Section 676 in case it elects, as it has done, to take advantage of the section, or if not on an express contract, then upon an implied contract to pay the sums provided therein or the reasonable damages suffered by the owner, based upon having received the advantage of the provision, or else—and we are inclined to think this the true solution—upon a quasi-contract based on the statutory obligation incurred by reason of having taken the benefit of the statute.

ARGUMENT.

I.

WHEN THE UNITED STATES CONSENTS TO A SUIT AGAINST IT OR ASSUMES OBLIGATIONS, THE COURT IS BOUND TO DECIDE IN THE SAME MANNER AS BETWEEN MAN AND MAN ON THE SAME SUBJECT.

This was decided in an early and leading case.

"By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man, on the same subject matter."

United States v. Arredondo, 6 Pet. 691, 711.

So when the United States assumes a claim against a State, although the United States does not ordinarily pay interest, it must pay interest as the State would pay it.

United States v. McKee, 91 U. S. 442.

It is liable for funds fraudulently obtained, as an individual.

United States v. State Nat. Bank, 96 U. S. 30.

It must pay upon a *quantum meruit* where an implied contract arises.

Clark v. United States, 95 U. S. 539.

"To constitute such a contract, there must have been some consideration moving to the United States."

Knote v. United States, 95 U. S. 149.

It has been said that the United States stands in a more favored position than the ordinary suitor and does not pay interest and costs to the individual, although the individual may be obliged to pay to it.

United States v. Verdier, 164 U. S. 213.

Yet the same court has declared that the rule that the United States does not pay interest is not uniform.

United States v. McKee, ubi supra.

So under the Tucker Act there is discretion to award costs, which discretion is usually exercised.

United States v. Harmon, 147 U. S. 269.

In actions in the Supreme Court of the United States, where a State is a party, there is not only power to award costs, but it is said:

"there is no reason why the plaintiff should not suffer the usual consequences of failure to establish its case."

Missouri v. Illinois, 202 U. S. 598.

Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 460.

II.

IT IS ADMITTED THAT THE PLAINTIFFS HAVE SUFFERED DAMAGE, FOR WHICH THEY HAVE RECEIVED NO JUST COMPENSATION.

The court below said:

"by the judgment of condemnation the Government virtually acquired an option to purchase the plaintiffs' interests for a certain sum of money, * * * It is apparent that the plaintiffs have suffered damage and have been put to expense by reason of the condemnation suit." (Tr., p. 22.)

and

"The plaintiffs have been prejudiced, it is true, and the more prejudiced as the proceedings advanced to the judgment of condemnation and of valuation, but this is merely *damnum absque injuria.*" (Tr., p. 25.)

The damage is admitted, but it is said to be *damnum absque injuria* because there was no "taking" and the advantage acquired by the Government was not "property."

Based on this damage, and in some cases going so far as to provide for the damages suffered merely by bringing the suit, a number of the States have

enacted statutes for indemnity, among them Massachusetts, Minnesota, Iowa, Pennsylvania and New Jersey, construed in the following cases:

Ford v. Board of Park Commissioners, 148 Ia. 1, 126 N. W. 1030, 23 Ann. Cas. 940.

Drury v. Boston, 101 Mass. 439.

Whitney v. Lynn, 122 Mass. 338.

Minnesota R. Co. v. Whitworth, 32 Minn. 452, 21 N. W. 476.

Re Pittsburgh, 243 Pa. 392, 90 Atl. 329, 52 L. R. A. (N. S.) 262.

In re Port Reading R. Co., 75 N. J. L. 430, 68 Atl. 219.

Walsh v. Board of Education of Newark, 73 N. J. L. 643, 64 Atl. 1088.

The Hawaiian statute under consideration is unlike most of these statutes which provide for discontinuance. It provides for another case, namely, where the Government elects to take advantage of the judgment and to claim under it for two years, a new and valuable right not given by the mere authority of condemn.

There are cases in which it was held that an unreasonable delay in prosecuting render the plaintiff liable to damages suffered by the defendant, but the rule would seem to be, as quoted by the court below from Lewis on Eminent Domain, that the plaintiff can dismiss within a reasonable time after the fixing of value. Some jurisdictions fix at twenty days and others at thirty days.

It has been suggested that even in this case it is within the discretion of the court to impose as a condition the payment of costs and damages.

Southern Pacific R. Co. v. Reis Estate Co., 15 Cal. App. 216; 114 Pac. 808, 810.

We repeat again, the damage which we claim here is damage incurred by the exercise by the Government of a right after the fixing of the price and the condemnation by claiming under the condemnation two years before they elect not to pay, a right which they would not have but for the procedure provided by this statute.

III.

THIS DAMAGE WAS NOT *DAMNUM ASBQUE INJURIA,* FOR IT WAS NOT SUFFERED IN THE COURSE OF THE ORDINARY PROCEEDINGS IN A COURT OF JUSTICE, IN COMMON WITH THE PUBLIC GENERALLY, BUT BY REASON OF RIGHTS ACQUIRED UNDER THE JUDGMENT OF CONDEMNATION, UNDER WHICH THE UNITED STATES CLAIMED AND THE BENEFITS OF WHICH IT RECEIVED.

The judgment is a "final judgment" (Sec. 676) and "rights" are obtained under it, for on the failure to pay within two years "all rights which may have been obtained by such judgment shall be lost to the plaintiff," and it bears interest "thirty days after final judgment." It is, moreover, a part of the procedure and is followed by a final order of condemnation.

"When all payments required by the final judgment have been made, the court shall make a final order of condemnation, * * * and thereupon the property described shall vest in the plaintiff."
Section 677, Revised Laws of Hawaii, 1915.

This is not a case of *damnum absque injuria,* and "temporary inconvenience to private parties, in common with the public in general" (*Hamilton v. Vicksburg, Shreveport & Pacific R. R. Co.,* 119 U. S. 280), such as the liability of every one to suit and to the incidental expenses in defending the action. Whether such damages are deemed compensated in the judgment, as was said in *Shoemaker v. United States,* 147 U. S. 282, 321, or whether they are *damnum absque injuria,* is immaterial; and it is also immaterial whether there is any right to recover when the dismissal is after the ascertainment of the amount and *before final judgment.* In this case *final judgment* was entered and a claim of rights made under it for two years. (Tr., p. 8.) It is also immaterial whether we can recover according to the provision of the Hawaiian statute, or whether recovery is to be had upon a *quantum meruit.*

No case cited in the learned and exhaustive opinion of the court below meets this case. *Carlisle v. Cooper,* 64 Fed. 472; *Downs v. Reno,* 124 Pac. 582, and the other cases cited, aside from the two from Connecticut hereafter referred to, deal with costs on dismissal *before final judgment,* whereas final judgment was entered in this case and the Government obtained its benefit and claimed under it for two

years. It is worthy of note that the opinion in *Carlisle v. Cooper* does not notice *United States v. Engeman,* 46 Fed. 898, in the same district, where a different result was reached. In all these cases, including the Connecticut cases, as is said by the court below, "The proceedings were only preliminary to a taking." (Tr., p. 21.)

Thus in *Lamb v. Schottler,* 54 Cal. 319, it is said:

"It is obvious that the public had acquired no new right under these proceedings before the repeal of the act." (Tr., p. 25.)

There the State immediately expressed its dissatisfaction. Up to that time (the payment), "he (the owner) parts with nothing, and the public receives nothing." (Tr., p. 24.)

IV.

FOR THIS DAMAGE THE PLAINTIFFS ARE ENTITLED TO RECOVERY: (a) UNDER THE CONSTITUTION; (b) BY VIRTUE OF THE ACT OF CONGRESS ADOPTING THE PROCEDURE; AND (c) IF NOT ADOPTED AS A PART OF THE PROCEDURE, THEN UNDER AN IMPLIED CONTRACT, HAVING RECEIVED THE BENEFITS, TO PAY ACCORDING TO THE HAWAIIAN ACT, OR ELSE UPON A *QUANTUM MERUIT.*

(a) *Plaintiffs are entitled to just compensation, their private property having been taken for public use.*

"There are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken."

Pumpelly v. Canal Co., 13 Wall. 166, 20 L. Ed. 557, 561.

Langford v. United States, 101 U. S. 341, 25 L. Ed. 1010.

So the filing of a map showing that the land was set aside for an avenue has been held to be within the constitutional provisions.

Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543.

See, also,

Peabody v. United States, 231 U. S. 530, 58 L. Ed. 350.

Richards v. Washington Terminal Co., 233 U. S. 546, 58 L. Ed. 1088.

Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739.

In the Monongahela Bridge Company case, in which it was held that the damage was one common to others and incurred in the exercise of a police power, the court said:

"Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or

were hostile to the fundamental principles devised for the protection of the essential rights of property."

Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. Ed. 435, 443.

A similar provision in Section 1 of Article 14 of the Amendments applicable to the States,

"Nor shall any State deprive any person of life, liberty or property without due process of law."

has been held to invalidate an ordinance by which two-thirds of the owners of abutting property may establish a building line at their discretion, where the ordinance provided no compensation for the owner.

Eubank v. Richmond, 226 U. S. 137, 57 L. Ed. 156.

Where an owner of land claimed that his property had been taken by the establishment of a building line on all property fronting on a certain boulevard, the court said:

"Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and *disposal* of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property."

St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861; 21 L. R. A. 226, 228.

(b) *The provisions of the Revised Laws of Ha-*

waii have been adopted by Congress as a part of the law.

The Act of Congress directs such proceedings "to be prosecuted *in accordance with the laws* relating to suits for the condemnation of property of the States wherein the proceedings may be instituted." In prosecuting the condemnation suit in accordance with the laws of the Territory of Hawaii relating to the condemnation of property, a final judgment was entered which is provided for by Section 676 of the Revised Laws, which section provides the procedure for payment, the rights acquired under the judgment by both parties, and this is followed by the final order of condemnation upon the payment of the judgment provided for in Section 677, and by Section 678 possession is authorized pending the proceedings, the money being paid into court. All these laws clearly regulate the proceedings for the condemnation of property, and the Government cannot acquire rights under them without the corresponding liability to pay.

As said by Mr. Justice Field, the representation of the United States by its attorneys

"constitutes a sufficient waiver of the immunity. The legislation amounts to a consent to such proceedings as the state laws authorize for the condemnation of property in which the United States are interested. * * * the legislation is, in legal effect, little more than a declaration that the United States will pay the compensation which may be awarded

* * * in proceedings taken in accordance with its laws."

United States v. Jones, 109 U. S. 513, 27 L. Ed. 1015.

The proceedings

"include *all the regulations* and steps incident to that process, from its commencement to its termination as prescribed by the State laws; so far as they can be made to apply to the federal courts; as this court held in *Wayman v. Southard* (10 Wheat. 27, 28), and, also, in *Beers v. Houghton* (9 Peters), *United States v. Knight* (14 Peters), *Amis v. Smith* (16 Peters 312)."

Duncan v. Darst, 1 How. 301, 11 L. Ed. 139, 141.

Beers v. Haughton, 9 Pet. 329, 9 L. Ed. 145.

United States v. Knight, 14 Pet. 301, 10 L. Ed. 465.

A "proceeding" is defined as the instrument whereby the party injured obtains redress for wrongs committed against him, either in respect to his personal contracts, his person, or his property.

Sanford v. Sanford, 28 Conn. 6.

It includes any step to be taken in a cause which is authorized by law in order to enforce the rights of the parties.

State v. District Court, 33 Mont. 359, 83 Pac. 641.

Ex parte McGee, 33 Ore. 165, 54 Pac. 1091.

"'The word "proceeding" includes the form and manner of conducting judicial business before a

court or judicial officer, regular and ordinary process in form of law; including all possible steps in an action from its institution to the execution of judgment. In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object.' 23 Am. & Eng. Ency. of Law, 155."

Greenleaf v. Minneapolis, St. P. & S. S. M. R. Co. (N. D. 1915), 151 N. W. 879, 882.

It has been expressly decided, in a case very much in point, that a similar provision comes under the term "procedure."

"An act to regulate the procedure in conducting actions at law would undoubtedly cover provisions for the discontinuance of actions, although the purpose of every action is to ascertain and compel the payment of a debt or of damages."

The court required the payment of costs, expenses and counsel fees to the landowner upon abandonment.

In re Port Reading R. Co., 75 N. J. L. 430, 68 Atl. 219, 221.

It cannot be claimed that Congress intended to adopt the part of the section which gives the United States a right, which it has availed of, to wait two years before determining whether it will take the property or not, but that it did not intend to adopt the provision that if it wait these two years and does not take, it must pay the damages. This is not a question of subjecting a sovereignty to costs or to

interest. The question is whether the Act of Congress in providing that the Government, in following the procedure, should acquire this right for two years intended to deprive the owner of the corresponding obligation, which is an integral part of the entire procedure. This is inconceivable.

The provisions of the State law only give way when they are "inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress."

Luxton v. North River Bridge Co., 147 U. S. 337.

Chappell v. United States, 160 U. S. 499.

In *Carson v. Hartford,* 48 Conn. 68, and *Stevens v. Danbury,* 53 Conn. 9, 22 Atl. 1071, damages were denied because the act contemplated the right of the city to withdraw after the ascertainment of the damages, and in each case the city withdrew within a reasonable time. In the latter case it is said:

"There is generally a provision in such resolutions that the payment shall be made, if at all, within a limited time; and *there ought properly to be such a provision in every case.*"

In the former case, after referring to two of the numerous Maryland cases sustaining the right to recover, and two Louisiana cases to the same effect, cites from *Norris v. Mayor,* 44 Md. 598, as follows (the italics those of the Connecticut court):

"When the assessments have all been finally settled, the city then can fairly exercise the election to

abandon the enterprise or pay the assessments and proceed with the work. For losses to owners *subsequently occasioned* through failure of the city authorities thus to *abandon or pay* it is, we think, just and right that the city should be held liable, and this we understand to be the effect of the decision in Graff's Case."

Carson v. Hartford, ubi supra.

(c) *If Congress has not adopted this provision as a part of the procedure, then there is an implied contract on the part of the Government to pay.*

In the great case of *Ogden v. Saunders,* Chief Justice Marshall, in discussing the proposition that the obligation of a contract rests on the express or implied assent of the parties, and not on positive law, says:

"A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations which, as honest, fair, and just men, they ought to have made."

Ogden v. Saunders, 12 Wheat. 213, 341.

"Implied contracts are such as reason and justice dictate from the nature of the transaction, and which, therefore, the law presumes that every man undertakes to perform."

2 Story, Const., Sec. 1377.

An action of *indebitatus assumpsit* is founded on an implied promise which the law imputes, to fulfill an obligation based on a duty.

Bailey v. N. Y. C. and H. R. R. R. Co., 22 Wall. 604.

But as Mr. Justice Story has said:

"The promise is only the form in which the law announces its own judgment upon the matter of right and duty and remedy; and under such circumstances any argument founded upon the form of the action, that it must arise under or in virtue of some contract, is disregarded, upon the maxim *qui haeret in litera, haeret in cortice.*"

Cary v. Curtis, 3 How. 236, 255.

Or, as is sometimes said, the tort may be waived and the law will imply a promise on which suit can be brought.

Brainard v. Hubbard, 12 Wall. 1.

Fiedler v. Curtis, 2 Black. 461.

If it is not held that the United States has expressly promised to pay what the law imposes as its duty to pay, it clearly, having received the benefit, must fulfill the obligation. The foundation of this doctrine is found in the civil law doctrine that one man cannot enrich himself at the expense of another without being liable to repay.

V.

THE PLAITIFFS ARE ENTITLED TO RECOVER UPON A QUASI-CONTRACT, VIZ: A STATUTORY OBLIGATION VOLUNTARILY INCURRED. A CLAIM WHICH DOES NOT SOUND IN TORT.

The true solution of the matter is that the claim of the plaintiffs comes within the Tucker Act, since it

is a statutory obligation of the United States founded on an adequate consideration, and not sounding in tort. The court below is clearly in error in assuming that there has been anything tortious in the conduct of the United States. They were pursuing their just right in accordance with the procedure which had been adopted by Congress, and, thus proceeding, were subject to the reciprocal obligation which the statute imposed, and that obligation is in the nature of a quasi-contract.

In an obligation like the half pilotage act, which had been before the Supreme Court of the United States, the court said of the recovery:

> "It was not a penalty that was recovered. There was a tender of services upon which the law raised an implied promise to pay the amount specified in the statute."
>
> *Ex parte McNeil,* 13 Wall. 236.

Mr. Justice Field says, in a case where it was held that the repeal of the act did not repeal the right of recovery, that this "transaction is regarded by the law as a quasi-contract" and stands on substantially similar grounds to the implied contract which the law raises where one has incurred an obligation or duty.

> *Pacific M. S. S. Co. v. Jolliffe,* 2 Wall. 450.
> Keener on Quasi-Contracts, p. 16.
> Street on Legal Liabilities, Vol. II, Ch. XXI.

It is true that in cases like *Louisiana v. New Orleans,* 109 U. S. 286, it is said that such a quasi-con-

tract, where it sounds in tort is not protected by the clause of the Constitution forbidding any State to enact a law impairing the obligation of a contract, but this obligation does not sound in tort but rests upon the exercise by the Government of an undoubted right, nor does any question arise under that clause.

CONCLUSION.

In conclusion, we submit that within the express language of the Tucker Act our claim is founded upon the Constitution, since we have been deprived of the full use of our property, without compensation other than that provided in the Act, that it does not sound in tort, and that the plaintiffs would be entitled to the redress demanded under the Hawaiian statute against the United States in a court of law if the United States were suable; and we respectfully request that the judgment be reversed and the court below directed to overrule the demurrer.

Dated, Honolulu, T. H., April 12, 1917.

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